INDEX

Page

Reply to Respondent's Statement of the Case 1

Argument 4

I. Respondent's Interpretation of the Court of Appeals' Opinion Is Implausible and Inconsistent With His Previous Position, and Respondent Has Tacitly Conceded the Errors of Which Petitioner Complains 4

II. Since the District Court Applied the Correct Standards and Reached an Inescapable Conclusion, Its Judgment Should Be Reinstated 11

Cases Cited

Baker v. Warner, 231 U.S. 588 (1913) 17

Chambers County v. Clews, 21 Wall. 317 (1874) 12

Delk v. St. Louis & San Francisco R.R. Co., 220 U.S. 580 (1911) 17

Filler Products, Inc. v. N.L.R.B., 376 F. 2d 369 (4th Cir. 1967) 14

Fort Smith Broadcasting Co. v. N.L.R.B., 341 F. 2d 874 (8th Cir. 1965) 8, 14

Frosty Morn Meats, Inc. v. N.L.R.B., 296 F. 2d 617 (5th Cir. 1961) 16

Gibson v. Lockheed Aircraft Co., 350 U.S. 356 (1956) 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 4, 6, 7, 8

Grand Chute v. Winegar, 15 Wall. 355 (1872) 11

Hodgson v. First Federal Savings and Loan Association of Broward County, Florida, 455 F. 2d 818 (5th Cir. 1972) 5

Nachman Corp. v. N.L.R.B., 337 F. 2d 421 (7th Cir. 1964) 14
Nemaha County v. Frank, 120 U.S. 41 (1887) 12
Nix v. N.L.R.B., 418 F. 2d 1001 (5th Cir. 1969) 16
N.L.R.B. v. Ayre Lar Sanitarium, 436 F. 2d 45 (9th Cir. 1970) 16
N.L.R.B. v. Brown, 380 U.S. 278 (1965) 14
N.L.R.B. v. Fibers International Corp., 439 F. 2d 1311 (1st Cir. 1971) 14
N.L.R.B. v. Local 38, 388 F. 2d 679 (9th Cir. 1968) ... 14
N.L.R.B. v. Newhoff Bros. Packers, Inc., 398 F. 2d 640 (5th Cir. 1968) 8

Radio Officers v. N.L.R.B., 347 U.S. 17 (1954) 14
Rafford v. Randle Eastern Ambulance Service, 348 F. Supp. 316 (S.D. Fla. 1972) 14
Reading & Bates, Inc. v. N.L.R.B., 403 F. 2d 9 (5th Cir. 1968) 14

Self-Reliance Ukranian American Coop. Ass'n. v. N.L.R.B., 461 F. 2d 33 (7th Cir. 1972) 16
Southwest Latex Corp. v. N.L.R.B., 426 F. 2d 50 (5th Cir. 1970) 16

Terrell v. Feldstein Company, Inc., 468 F. 2d 910 (5th Cir. 1972) 13
Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) 14

Text Cited

Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. (1971) 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF[1]

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Although respondent's "Statement of the Case" is more in the nature of an argument than an accurate portrayal

[1] The United States had informally indicated to petitioner's counsel that it intended to file a brief *amicus curiae* in this case but refused to state when such a brief would be filed or to discuss its substance or tenor, even generally. On March 19, 1973, eight days before oral argument and the date upon which the instant reply was required to be submitted to the printer, petitioner received page-proof copies of the government's memorandum. Peti-

Cont'd.

of actual occurrences, we do not deem it appropriate or necessary to engage in a line-by-line refutation of respondent's version of the facts. Several of respondent's contentions, however, cannot pass unnoticed.

One particularly erroneous assertion appears at page 12 of Respondent's Brief where he states that "it was not shown, however, that Green had *known about* or participated in the plan to chain the building." To the contrary, the undisputed evidence established that Green, as leader of the group, was told by one of his subordinates that he was planning to chain the front door of the Roberts Building and that Green approved that proposal (A. 132-33).

Respondent asserts at pages 17-18 that the issue of racial discrimination was not tried by consent, although at pages 36-37 he refers to the evidence offered on that subject as creating a *prima facie* case of discrimination. In addition to the abundance of "racial" evidence referred to at pp. 12-13 of our main brief, the record shows that counsel for McDonnell stated the issue being tried as whether Green "was refused employment allegedly because of discriminatory reasons" (A. 55). And counsel for Green repeatedly made reference to the "discrimination that occurred in 1965" (A. 56), and fully briefed and argued the issue of race. The District Court opinion examined in detail Green's evidence of discrimination (318

---

tioner has not had an adequate opportunity to analyze the memorandum, and this reply is accordingly directed solely to respondent's brief. We would observe, however, that the participation of seven members of the Department of Justice and four attorneys from the EEOC (not to mention the five distinguished practitioners who appear as "counsel" to respondent) belies the government's assertion that this case involves nothing more than "the order and nature of proof" in one isolated claim of discrimination. The Court of Appeals' rules are substantive in nature and are expressed in terms applicable to virtually all Title VII cases.

F. Supp. at 847) and rejected respondent's suggested inferences.

Respondent also complains that he was denied timely access to statistics of the racial composition of McDonnell's work force with the result that he was foreclosed from effectively cross-examining petitioner's witnesses (Br. 13). This contention is without merit. Respondent originally sought, in effect, access to all of McDonnell's employment records covering an eight-year period (A. 11, 18). When this oppressive demand was denied, respondent did not seek any other statistical data from petitioner, and the racial statistics supplied by McDonnell to the government were never requested (A. 458-64). Nonetheless, at trial Green did have access to thirteen pages of statistical racial information[2] supplied by his witness, Peter Robertson, which no doubt explains his failure to request such information from McDonnell. And, contrary to the statement in his brief (Br. 13), he cross-examined McDonnell's witnesses Windsor (A. 409-10) and Krone (A. 465-68) at length on the basis of those same statistics.

---

[2] Contrary to respondent's assertions, these statistics are not at all indicative of any discrimination.

ARGUMENT

I. Respondent's Interpretation of the Court of Appeals' Opinion Is Implausible and Inconsistent With His Previous Position, and Respondent Has Tacitly Conceded the Errors of Which Petitioner Complains.

Respondent has evidently despaired of any attempt to justify the holding of the Court of Appeals but instead contends that the majority opinion below doesn't really mean what it appears to say. Although respondent characterizes the prevailing Eighth Circuit opinion as "careful" (Br. 37), he himself seems to have encountered severe difficulty in arriving at any consistent interpretation of that holding. Although we agree with respondent that the opinion below, as we read it and as respondent has previously construed it, is unduly strained, we suggest that respondent's disclaimer of the opinion's meaning and import is disingenuous.

Respondent's brief makes no attempt to answer petitioner's argument on the several critical issues presented by this case but, rather, he asserts:

(1) That the Court of Appeals did not shift the burden of proof to the employer upon proof of a Title VII claimant's race and qualifications;

(2) That the Court of Appeals did not rely on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and did not require petitioner to establish the stall-in's job relatedness;

(3) That no preferential rules were created for minority job applicants; and

(4) That the Court did not purport to restrict either the admissibility or the weight to be accorded to subjective evidence of the employer's motivation.

As we read the opinion below, respondent's characterization of the Eighth Circuit's holding is legally and linguistically without foundation. Certainly it is contrary to the interpretation of the dissenting judge and of respondent himself in his Brief in Opposition to our Petition for Certiorari.[3] *At best*, the state of the law has been hopelessly confused by the opinion below and should be clarified by this Court. We will discuss respondent's contentions as to the meaning of the majority opinion below *seriatim*.

1. The Court of Appeals plainly held that a *prima facie* case of discrimination is made by a black man upon proof of his qualifications to fill an open job. The obvious result flowing from this statement is that the employer is guilty of discrimination if he fails to come forward to rebut the *prima facie* showing. In discussing the effect and impact of a *prima facie* rule, the court in *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F. 2d 818, 822 (5th Cir. 1972), stated:

> "In discrimination cases the law with respect to burden of proof is well-settled. The plaintiff is re-

---

[3] A further indication of the construction being accorded to the Eighth Circuit's opinion in a broad range of contexts can be gleaned from a brief recently filed in *Gossin v. Huskey*, No. 72-1558, currently pending in the Eighth Circuit, a case in which respondent's present counsel represented the plaintiff in the district court and has appeared as co-counsel for the appellant in the Court of Appeals. In appellant's brief, the judgment entered by the district court in favor of the defendant-employer is criticized, at page 31, because, *inter alia*, "there is no objective evidence" supporting the employer's position. At page 34, the decision here for review is summarized as follows:

> "Green v. McDonnell Douglas Corporation, supra, holds that a black person makes out a *prima facie* case of impermissibly biased treatment when he demonstrates that he was qualified for the job denied him. The burden then shifts to the employer to demonstrate that its failure to hire or rehire was based upon bona fide objectively-ascertained, non-pretextual, non-discriminatory, reasonable and not arbitrary conduct and criteria."

quired only to make out a *prima facie* case of unlawful discrimination *at which point the burden shifts to the defendant* to justify the existence of any disparities. See, e.g. Norris v. Alabama, 294 U.S. 587. . . . Once the plaintiff has made out his *prima facie* case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons which would exonerate him." (Emphasis supplied.)

Respondent apparently concedes the impropriety of imposing the burden upon the employer, as we find no defense of the Court of Appeals' holding in Respondent's Brief, but merely a statement that we have misconstrued what the majority said or meant. The inconsistency of respondent's evaluation of the opinion below is evidenced by his own Brief in Opposition to the Petition for Writ of Certiorari filed in this case. There, at page 5, in summarizing the holdings of the Court of Appeals, he stated that:

> ". . . once a *prima facie* showing of racial discrimination has thus been made the burden shifts to the employer to prove the constitutional and statutory bona fides of its refusal to hire."[4]

2. Equally artificial are respondent's suggestions that the Court of Appeals did not rely upon *Griggs v. Duke Power Co.* and did not hold that petitioner's reasons for rejecting Green's application must be job-related.

Although the modified majority opinion made some deletions, it still contains two specific *Griggs*-like state-

---

[4] If in fact mere "qualification" for a job creates a *prima facie* case of discrimination, such "qualification" should have a broader meaning than that which has been utilized in this case, *i.e.* mere technical and physical ability to perform the work. It should also include freedom from personality traits and past conduct which would indisputably offend the sensibilities of ordinary people. It should encompass not only the ability to perform the job but also the willingness to do so loyally.

ments requiring an appraisal of job-relatedness.[5] The revised opinion also includes a direct quote from *Griggs*: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited." 463 F. 2d at 352. In addition, the concurring opinion, adhered to following the modification of the majority view (463 F. 2d at 352), specifically purports to restate the majority opinion as holding that the employer must prove "that the reason for the rejection is objectively related to job performance." 463 F. 2d at 346.

At the time of the filing of his Brief in Opposition, respondent apparently had a different understanding of the significance of the job-related requirement and of the reliance of the Court of Appeals upon *Griggs*. In formulating his version of the question presented by this case, respondent, at page 5, stated:

> "The question presented is whether the Court of Appeals improperly interpreted anti-discrimination provisions of Title VII, 1964 Civil Rights Act, when it instructed the trial court that an employer's evidence of objective, job-related reasons for refusing to hire an applicant will carry more weight in rebutting a *prima facie* showing of bias, than will an employer's evidence of subjective reasons that fail to relate the applicant's qualifications to legitimate, non-discriminatory job requirements and business necessity."

And contrary to the assertion in his brief on the merits (Br. 24) that the Court of Appeals "neither squarely relied on nor squarely had to rely on *Griggs v. Duke Power Co.*," respondent's Brief in Opposition, stated that the majority opinion "flow[ed] directly from this Court's opinion in *Griggs*."

---

[5] See footnote 13 to petitioner's main brief.

Respondent's approach to this issue constitutes a concession that this case is not measurable with a *Griggs* yardstick and that no showing of job-relatedness is either necessary or appropriate.

3. In response to petitioner's argument that the *"prima facie"* test of the Court of Appeals creates, in effect, reverse discrimination in favor of minority applicants, respondent attempts to ameliorate the manifest unfairness and illogic of such a rule by contending rather lamely that the court referred to "a black man" only because of the facts of this case (Br. 22, 35).

To avoid admitting the resulting favoritism, respondent states that a *prima facie* case would also be made by a qualified white person in similar circumstances. Apparently respondent would attempt to convince this Court that anyone who "claims" racial discrimination can avail himself of the Eighth Circuit's *prima facie* rule. The problems with respondent's approach are manifold. The mere color of an applicant's skin proves nothing, nor does his *assertion* of racial discrimination.[6] He must point to some factor that permits some inference that he was treated differently *because of* his color. Moreover, respondent's interpretation clearly shifts the burden of proof to the employer almost from the outset, despite his transparent disclaimer of any intention to do so.

Respondent, recognizing the weakness of his construction of the appellate court decision and anticipating the consequences of his disavowal of its rationale, contends alternatively that he made a *prima facie* case nonetheless because of his previous work record at McDonnell (Br. 35-37). The trouble with this assertion, however, is that

---

[6] Under the NLRA, it has consistently been held that the mere fact of a discharged employee's union membership does not create any inference of anti-union animus. See *e.g. N.L.R.B. v. Neuhoff Bros. Packers, Inc.*, 398 F. 2d 640 (5th Cir. 1968); *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874 (8th Cir. 1965).

his claims of discrimination during his prior employment were rejected by the trial court. The Court of Appeals did not set aside any of these findings, but respondent appears to be asking this Court to retry these factual issues anew.

Finally, even assuming a *prima facie* case was made, McDonnell clearly rebutted it and showed ample justification for its refusal to hire Green.[7]

4. Respondent's preoccupation with semantics has caused him to miss the mark with his contention that the Court of Appeals' "objective-subjective" rules do not limit or disparage the type of evidence which may be offered but are referable only to the permissible criteria for making employment decisions (Br. 26-29). The initial problem resulting from the "objective-subjective" issue is that such concepts have no relevance whatsoever to the instant case, and the Court of Appeals' attempt to discuss this action in terms of subjectivity or objectivity is simply erroneous and productive of misunderstanding.

The original majority opinion held that McDonnell would be required to make proof of its motivation "in some objective way" (463 F. 2d at 344), and the revised majority opinion continued to criticize at length "subjectively-based hiring decisions." The upshot of this language was summarized in Judge Johnsen's supplemental dissent, 463 F. 2d 355:

---

[7] Respondent contends that he made a *prima facie* case for reasons other than those considered by the Eighth Circuit, and that he is therefore entitled to an affirmance of the judgment of the Court of Appeals. Such a contention, besides ignoring McDonnell's rebuttal of Green's evidence, is also erroneous because even if this Court determines that another trial should be had, such a trial should be conducted in accordance with proper standards enunciated by this Court for this and other Title VII cases. Under those circumstances, the judgment of the Court of Appeals would have to be vacated inasmuch as it has remanded the case to the District Court "for further proceedings consistent with the majority opinion" (A. 47).

> "Any proof that would be possible in attempting to show that Green would be an industrial handicap to the operation of the plant would necessarily involve opinion or subjective testimony which, as pointed out in my original dissent, the majority opinion declares to be of 'little weight in rebutting charges of discrimination.'"

Respondent contends that the Court of Appeals merely held that "subjective criteria" are less persuasive than objective criteria. In the context of this case, however, the majority opinion appears to instruct the District Court to disregard any of McDonnell's subjective evidence as to its reasons for refusing employment to Green because of their "pretextual" propensities and their frequent utilization as a "cloak" for racial discrimination. The effect of the Court of Appeals' holding is that in a refusal-to-hire case the employer must be able to identify some definitive standard or policy, uniformly and regularly applied, which disqualifies the individual applicant. Any other non-objective reasons for rejecting his application are suspect and infirm and are entitled to no credence. Hence, any "subjective" testimony as to hiring decisions which is not directed to and measured by pre-existing "standards" is, according to the Court of Appeals, forbidden or at least "pretextual."

As pointed out in our principal brief, the interjection of "objective-subjective" concepts into an individual refusal-to-hire context is totally unwarranted and inevitably confusing. This is particularly true in the case at bar because, whether one's reaction to Green's activities is denominated "subjective" or "objective," it is a revulsion universally experienced by law-abiding people. This is not a case where unidentifiable factors might have been used to mask racial prejudice, but is rather an instance where the respondent is attempting to invoke rules designed for

other situations in order to excuse conduct calculated to offend everyone.

Respondent cites several authorities concerned with promotion and transfer, and seniority and testing, where current practices served to perpetuate the effects of prior rampant discrimination. All of the cases relied on by Green were class actions or government pattern-and-practice suits, and none of them held that a job applicant can recover under Title VII merely because his rejection was based on subjective reactions. Furthermore, "objective" observations may be available where the employee has been performing his job for awhile and can be compared to fellow employees for, *e.g.*, promotion, transfer or layoff purposes. But such considerations are singularly inappropriate to a refusal to hire, and particularly to one based on unprotected and illegal misconduct.

II. Since the District Court Applied the Correct Standards and Reached an Inescapable Conclusion, Its Judgment Should Be Reinstated.

Respondent, though tacitly conceding error by the Court of Appeals on the primary questions presented to this Court, nevertheless contends that he should be entitled to another trial because of the district court's original ruling striking allegations of racial discrimination from the amended complaint. Petitioner firmly believes that the trial court's reading of the Act was correct, but that issue is not before this Court. Petitioner, however, has never conceded that any error in that ruling was prejudicial to respondent, and the record affirmatively demonstrates a lack of prejudice. This Court must thus determine what disposition to make of this case. In *Grand Chute v. Winegar*, 15 Wall. 355, 369 (1872), the Court noted the absence of prejudice

resulting from the erroneous striking of a defense and thus refused to order a new trial:

> "Indeed it is evident that although the plea was technically excluded, no evidence was rejected on account of its absence, but that the defendant litigated every question of fact as far and as fully as it would have done if this pleading had remained."

See also *Nemaha County v. Frank*, 120 U.S. 41, 45 (1887); *Chambers County v. Clews*, 21 Wall. 317 (1874).

Respondent contends that the Eighth Circuit's reversal on the race discrimination question is not before this Court because the matter of "harmless error" was not specifically set forth in the "Questions Presented." The question of the effect of the Court's striking of allegations of racial discrimination is hardly of such magnitude of itself to warrant the exercise of this Court's certiorari power, and thus was not enumerated separately in our Petition for Certiorari as one of the important Questions Presented. It is, however, squarely encompassed within Question 1 because the Court of Appeals has held that, on account of respondent's race and his plea of racial discrimination, McDonnell is to be held to a greater task of proof and cannot rest "its case upon a showing that Green had participated in unlawful civil rights activities as reasons for declining to rehire him." 463 F. 2d at 352. Moreover, the ultimate issue posed by this case is whether McDonnell violated the Act by its refusal to hire Green, and since this Court has agreed to review the case, sound principles of judicial husbandry and this Court's inherent supervisory power require a disposition which would be most equitable and just under the circumstances and which would avoid the unnecessary waste of judicial time and energy.

The Eighth Circuit criticized the District Court for applying improper standards to the issues of this case and

ordered a new trial under new rules. We have demonstrated here the inappropriateness of the Eighth Circuit's rules, and it is evident that the District Court was absolutely correct in its evaluation of the testimony and its application of legal principles to the evidence adduced. Respondent seeks a remand to the District Court in order to pursue his discovery, which was previously restricted to proper bounds, and intimates that he might prove his case through statistics. The statistical information sought by Green is in the record, and it is probative of nothing. His assertion that statistics may be highly relevant to this case is mistaken. Although some judges have stated their belief that *in class actions and pattern-and-practice suits*, statistics, if aggravated enough, may even create a *prima facie* case of discrimination, statistical evidence in a case of alleged individual discrimination, "is not determinative of an employer's reason for the action taken against the individual grievant." *Terrell v. Feldstein Company, Inc.*, 468 F. 2d 910, 911 (5th Cir. 1972). In the instant case, the relevant statistics were before the District Court and for obvious reasons were of no utility. Similarly, the District Court examined an extensive record of the treatment accorded to Green during his prior employment and found that his protestations of discrimination were more imagined than real.

Respondent requests another trial for the purpose of again attempting to show that some reason other than the stall-in and lock-in was considered by McDonnell when the decision not to hire him was made. According to Green, the existence of *any* improper consideration—however slight—would tarnish the whole decision and would automatically subject McDonnell to liability (Br. 31, note 11) even though the "stall-in" or "lock-in" would provide more than ample justification for rejection of Green's application. We submit that respondent has inaccurately stated the law and has proposed a test that fails to fur-

ther the purpose of Title VII, which is to proscribe intentional discrimination *on the basis of* race, color, religion, sex or national origin. It is this misconception of the law which has drawn respondent to his belief that a remand would be availing.

As indicated in our main brief, the search in an employment discrimination case is for the employer's *real motive*. Under Title VII, like under the NLRA, this inquiry should crystallize itself into an attempt to determine the employer's *principal, dominant* or *controlling* reason for taking the challenged action.[8] *Rafford v. Randle Eastern Ambulance Service*, 348 F. Supp. 316 (S.D. Fla. 1972); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 430 (D. Utah 1971). This test has received widespread approval under the NLRA when the question presented was whether or not the employer's decision was motivated by anti-union animus. See *e.g. N.L.R.B. v. Brown*, 380 U.S. 278 (1965); *Radio Officers v. N.L.R.B.*, 347 U.S. 17, 43 (1954); *N.L.R.B. v. Fibers International Corp.*, 439 F. 2d 1311 (1st Cir. 1971); *Filler Products, Inc. v. N.L.R.B.*, 376 F. 2d 369 (4th Cir. 1967); *Reading & Bates, Inc. v. N.L.R.B.*, 403 F. 2d 9 (5th Cir. 1968); *Nachman Corp. v. N.L.R.B.*, 337 F. 2d 421 (7th Cir. 1964); *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874 (8th Cir. 1965); *N.L.R.B. v. Local 38*, 388 F.2d 679 (9th Cir. 1968).[9]

---

[8] It should be noted in this connection that the District Court, discharging its function as the trier of fact, found the stall-in and lock-in to be the *sole* reasons why Green's application was turned down, an even stronger finding than required. 318 F.Supp. at 850.

[9] Respondent's suggestion that labor act cases "provide only minimal guidance" on Title VII questions is unpersuasive in this context. Both statutes are designed to ban discrimination in employment, and a test widely utilized for the purpose of identifying decisions inspired by anti-union animus would just as effectively serve to spot racially biased acts. See generally, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1259 (1971).

This "dominant motive" test furthers the intendment of Title VII by requiring, as a predicate to recovery, a causal link between the discrimination and the employment decision. Respondent's suggestion that *any* impermissible attitude or factor should illegitimize every employer decision cannot withstand scrutiny. Two examples will illustrate the fallacy of respondent's position:

1. Suppose that the owner of a watchmaking company has openly stated that he dislikes Irishmen. When O'Brien, who is blind, applies for an available job as a watchmaker, he is refused employment. Under respondent's theory, O'Brien could recover under Title VII even though anyone else having O'Brien's disability would also have been rejected. He was not denied employment *because he was Irish.*

2. Suppose that the personnel manager of a company has a record of never having hired a woman, although many job applications have been received from females. Ms. Smith applied for a job two days after she had committed a physical assault upon the president of the company. Even if we assume that the personnel manager harbors a prejudice against women, there could be no realistic contention that such bias was a causative factor in Ms. Smith's failure to gain employment.

In both of the above hypothetical cases and in the case *sub judice,* the rejection of the employment application is a foregone conclusion irrespective of the race, color, religion, sex or national origin of the applicant. Experience teaches us that the disqualifying conduct or characteristic of the applicant far outweighs and renders insignificant any bias which *might otherwise* have played a part in the decision.

To determine, therefore, whether an improper motive controlled the employment decision, the appropriate ques-

tion is whether the applicant would have been hired *but for* his race, color, religion, sex or national origin.[10]

Common sense and the evidence both demonstrate that employers with self-respect do not hire persons who have engaged in unlawful acts against them, whether those persons be black, white or Percy Green; and neither discovery, statistics nor additional trial proceedings will alter this basic fact of life. The rationale which should govern here was incisively stated by Judge Wisdom in a discharge setting in *Frosty Morn Meats, Inc. v. N.L.R.B.*, 296 F. 2d 617, 621 (5th Cir. 1961);

> "If . . . the misdeeds of the employee are so flagrant that he would almost certainly be fired anyway there is no room for discrimination to play a part. The employee will not have been harmed by the employer's union animus, and neither he nor any others will be discouraged from membership in a union, since all will understand that the employee would have been fired anyway. It must be remembered that the statute prohibits discrimination, and that the focus on dominant motivation is only a test to reveal whether discrimination has occurred. Discrimination consists in treating like cases differently. If an employer fires a union sympathizer or organizer, a finding of discrimination rests on the assumption that in the absence of the union activities he would have treated the employee differently."

The fact that the respondent in this case is black does not in any wise immunize him from the natural and an-

---

[10] For applications of such a rule in the labor area, see *Southwest Latex Corp. v. N.L.R.B.*, 426 F. 2d 50, 54-55 (5th Cir. 1970); *Self-Reliance Ukranian American Coop. Ass'n. v. N.L.R.B.*, 461 F. 2d 33, 38 (7th Cir. 1972); *N.L.R.B. v. Ayre Lar. Sanitarium*, 436 F. 2d 45 (9th Cir. 1970); *Nix v. N.L.R.B.*, 418 F. 2d 1001, 1010 (5th Cir. 1969). In *Nix*, the Court stated: "An improper motive must be a cause without which the employee would not have been discharged."

ticipated consequences of his misdeeds, nor should it require McDonnell to endure the futile ritual of yet another trial of his contrived claim. The District Court properly analyzed this case and correctly determined that Green's plea for equitable relief is barred by his unclean hands. This Court should enter the judgment which should have been rendered by the Eighth Circuit by reinstating the judgment of the District Court. *Delk v. St. Louis & San Francisco R.R. Co.*, 220 U.S. 580, 588-89 (1911); *Baker v. Warner*, 231 U.S. 588, 593 (1913); *Gibson v. Lockheed Aircraft Co.*, 350 U.S. 356 (1956).

Respectfully submitted,

R. H. McROBERTS

VERYL L. RIDDLE

THOMAS C. WALSH
500 North Broadway
St. Louis, Missouri 63102
Attorneys for Petitioner

BRYAN, CAVE, McPHEETERS &
McROBERTS
Of Counsel